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ABSTRACT

Nine case-related policy clarification memoranda issued by the Office for Civil Rights (OCR) are summarized in this booklet. Each memorandum deals with issues related to equal educational opportunities. Each summary consists of a question that defines the relevant issue, a statement of pertinent facts, the decision made by OCR regarding the issue, and a statement pertaining to the legal basis for the decision. The decisions were based on Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, or Section 504 of the Rehabilitation Act of 1973. Also included in this booklet are an index to the OCR Policy Digest and names and addresses of resource persons. (MK)

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DIGEST OF SIGNIFICANT CASE-RELATED MEMORANDA

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*The Office of Legal Standards, Program Support and Litigation reviews cases and responds to inquiries from within the Office for Civil Rights (OCR), Department of Education, to ensure that compliance determinations are consistent with established policy. This report consists of summaries of significant case-related policy clarification memoranda issued during August and September 1979 by the Office of Standards, Policy and Research, which carried out this function in OCR/HEW.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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Table of Contents for Volume I Number 3

Issue — Page

Title IX

May a school district use students' scores on a motor abilities test to assign them to physical education classes, if sex-segregated classes result? 1

On what basis should a determination be made of whether equal opportunity to receive coaching is provided in a recipient's athletic program? 4

What is an appropriate remedy for a failure to accommodate the athletic interests and abilities of each sex equally effectively? 6

What standards should be used to determine if the sports and levels of competition offered by a school district result in equally effective accommodation of the athletic interests and abilities of each sex? 8

Under what circumstances must a recipient open single-sex teams in noncontact sports to both sexes when participants are selected on the basis of competitive skill? 10

What data should be obtained and analyzed to determine if coaches of male and female teams are assigned in a nondiscriminatory manner? 12

Title VI

What are the appropriate standards of comparison to determine whether a school system has discriminated in its employment of teachers and administrators? Is a comparison of the percentage of minority teachers and administrators in the school system with the percentage of minority students in the school system an appropriate standard? 14

Table of Contents for Volume I Number 3

Issue — Page

Title VI (cont.)

Is a school district in violation of Title VI if, during the period of desegregation, it significantly decreases its proportion of minority teachers? 16

Section 504

Should the American National Standards Institute (ANSI) accessibility standards be used during a compliance review to determine whether a recipient's programs are accessible to physically handicapped persons? 17

Title IX
of the Education Amendments of 1972

Issue:

May a school district use students' scores on a motor abilities test to assign them to physical education classes, if sex-segregated classes result?

Facts:

OCR received a complaint that a school district had assigned students on the basis of sex to physical education classes. Specifically, students were assigned to single-sex physical education classes for all activities, contact and noncontact, on the basis of a single performance standard, the Scott Motor Abilities Test. These classes remained intact throughout the year.

Decision:

While the Title IX regulation permits grouping of students within physical education classes on the basis of ability, it does not specifically address assignment to physical education classes on the basis of ability. If, however, use of a test or other instrument results in a substantially disproportionate enrollment of persons of one sex in a class, a recipient is required to make certain that such disproportion is not the result of discrimination in the test or its application.

If sex-segregation or substantially disproportionate enrollments in classes result from bona fide ability grouping, there is no violation. The standards for determining whether ability grouping for class assignment is bona fide are the same as those enunciated under Title VI and ESAA; i.e., the grouping must be:

1) based on nondiscriminatory, objective standards of measurement that are educationally relevant to the purpose of such grouping;

2) determined by nondiscriminatory application of objective, educationally relevent standards;

May a school district use students' scores on a motor abilities test to assign them to physical education classes, if sex-segregated classes result?

3) maintained only as long as is necessary to achieve the purpose of such grouping;

4) designed to meet the special needs of students in each group;

5) designed to improve the performance of students in the less advanced groups by means of specially developed curricula, specially trained or certified instructional personnel, and periodic retesting to determine progress and eligibility for placement in a more advanced grouping; and

6) validated by test scores or other reliable objective evidence indicating the educational benefits of the grouping.

Authority:

This decision is based on the following sections of the Title IX regulation:

Section 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

May a school district use students' scores on a motor abilities test to assign them to physical education classes, if sex-segregated classes result?

Section 106.36 Counseling and use of appraisal and counseling materials.

(b) Use of appraisal and counseling materials. A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) Disproportion in classes. Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

OSPR Memorandum of August 13, 1979

Title IX
of the Education Amendements of 1972

Issue:

On what basis should a determination be made of whether equal opportunity to receive coaching is provided in a recipient's athletic program?

Facts:

OCR received a complaint that a school district was discriminating in its provision of coaches for girls' basketball. The school district offered both girls' and boys' basketball; each had three levels of competition: varsity, B-team, and freshman. Three coaches were provided for the boys' basketball teams, while the girls basketball teams had two coaches. Both programs had a similar number of participants, with 29 girls and 32 boys on the basketball teams.

Decision:

A compliance detemination should not be based on the provisions made in a single sport. A review of the opportunity to receive coaching in the overall athletic program is required before a compliance determination can be made. Data on the number of participants on girls' and boys' teams and the number of coaches provided should be obtained in order to determine the overall ratio of participants to coaches for girls' and boys' teams. A significant disparity in the overall participant/coach ratio for girls' and boys' teams would constitute a violation if it could not be justified by sex-neutral factors.

Authority:

This decision is based on the following section of the Title IX regulation:

Section 106.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In

On what basis should a determination be made of whether equal opportunity to receive coaching is provided in a recipient's athletic program?

determining whether equal opportunities are available the Director will consider, among other factors:

(v) Opportunity to receive coaching and academic tutoring.

OSPR Memorandum of August 29, 1979

Title IX
of the Education Amendments of 1972

Issue:

What is an appropriate remedy for a failure to accommodate the athletic interests and abilities of each sex equally effectively?

Facts:

OCR received a complaint alleging that a school district's athletic program failed to accommodate the athletic interests and abilities of each sex equally effectively. With one exception, the school district had not assessed students' athletic interests and abilities by any reasonable method. The sole exception was an assessment of interest in participating on a cross-country team. Although girls expressed interest in a cross-country team, no team was offered them. There was an 85 percent participation rate for boys in the overall interscholastic athletic program and a 49 percent participation rate for girls.

Decision:

The disparity in participation rates for males and females, the school district's inability to document that its athletic program gives equal weight to the interests of each sex, and the district's inaction on the expressed interest of female students in a cross-country team when considered together indicate that the district's overall athletic program does not accommodate the interests and abilities of each sex equally effectively. The remedy would be to increase athletic opportunities for female students through the addition of more sports for them and provide documentation that the resultant sports program gives equal weight to the interests of males and females. The documentation should include a description of the method used to assess students' interests in participating in interscholastic sports, the results of the assessment, the changes to be made in the interscholastic athletics program, and the actual or projected participation by students of each sex in the interscholastic athletics program.

What is an appropriate remedy for a failure to accommodate the athletic interests and abilities of each sex equally effectively?

Authority:

This decision is based on the following section of the Title IX regulation:

Section 106.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

OSPR Memorandum of September 17, 1979

Title IX
of the Education Amendments of 1972

Issue:

What standards should be used to determine if the sports and levels of competition offered by a school district result in equally effective accommodation of the athletic interests and abilities of each sex?

Facts:

OCR received a complaint alleging that a school district's athletic program did not meet the interests of its female students to the extent that it met the interests of its male students. In support of this allegation the complainants claimed that the school district had not assessed the athletic interests and abilities of its students, and that it offered male students more sports and teams than it offered its female students.

Decision:

There is no requirement per se to assess students' athletic interests and abilities. A recipient may, however, be required to document that its athletic offerings result in equal athletic opportunity, particularly when there is some indication that its selection of sports and the levels of competition (varsity, junior varsity, etc.) offered do not give equal weight to the interests and abilities of each sex.

Indications of a failure to accommodate interests and abilities equally effectively would include substantial disparity in athletic participation rates for each sex combined with insufficient evidence that the disparity in participation rates reflects a disparity in interest in participation by each sex as assessed by some reasonable method. Information should also be obtained about whether students of either sex have requested that particular sports or additional levels of competition be offered.

Where there are sex-based disparities in participation rates and in levels of competition offered in relation to the number of students wishing to participate in particular sports, the recipient should be asked to describe how the sports and number of teams offered each sex reflect their athletic interests and abilities as assessed by some reasonable means. This description should include the means used to assess students' athletic interests and abilities and the results of the assessment.

What standards should be used to determine if the sports and levels of competition offered by a school district result in equally effective accomodation of the athletic interests and abilities of each sex?

Authority:

This decision is based on the following section of the Title IX regulation:

Section 106.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

OSPR Memorandum of September 28, 1979

Title IX
of the Education Amendments of 1972

Issue:

Under what circumstances must a recipient open single-sex teams in noncontact sports to both sexes when participants are selected on the basis of competitive skill?

Facts:

In the course of investigating a complaint about discrimination in a school district's interscholastic athletics program, OCR found more athletic opportunities were currently and previously offered male students than female students. Specifically, several teams at different levels of competition (varsity, junior varsity, freshman) were offered boys in each of five sports: basketball, football, baseball, tennis, and track. Girls were offered a single varsity team in each of three sports: basketball, tennis, and volleyball. Participants on all the teams offered were selected on the basis of competitive skill.

Decision:

The greater number of teams and sports available for males shows that overall athletic opportunities for females are limited. Therefore, because neither track nor baseball is a contact sport, the school district must open participation on its "boys" baseball and track teams to female students who wish to try out for them. (There is no requirement that boys must be permitted to tryout for the girls' volleyball team because, although there is no volleyball team for boys, overall athletic opportunities for boys have been greater than those for girls.)

Authority:

The decision is based on the following section of the Title IX regulation:

Section 106.41 Athletics.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members

Under what circumstances must a recipient open single-sex teams in noncontact sports to both sexes when participants are selected on the basis of competitive skill?

> of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.
>
> OSPR Memorandum of September 28, 1979

Title IX
of the Education Amendments of 1972

Issue:

What data should be obtained and analyzed to determine if coaches of male and female teams are assigned in a nondiscriminatory manner?

Facts:

A complainant alleged that a school district discriminates on the basis of sex in the assignment of coaches to girls' teams. In addition to the general allegation, the complainant claimed that the male chosen to coach the girls' varsity softball team was less qualified than a female applicant. OCR examined data pertaining to the proportion of male and female coaches in the district's athletic program and determined that females represented 70 percent of the coaching staff for girls' teams. OCR regional staff, however, failed to examine data pertaining to the actual qualifications of coaches.

Decision:

These facts do not constitute a sufficient basis for a compliance determination. The sex of the coaches assigned to teams for each sex is irrelevant to a determination of whether athletes of each sex are being served by coaches with equivalent qualifications.

To determine whether nondiscriminatory assignment criteria have been applied, the qualifications of coaches for male and female teams should be compared. This would include a review of the relevant training and experience and coaching certification of the coaches assigned to teams for each sex. It is a violation of Title IX if teams for one sex are provided with more qualified coaches than those provided for teams of the other sex.

Authority:

This decision involves on the following section of the Title IX regulation:

Section 106.41 Athletics.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

What data should be obtained and analyzed to determine if coaches of male and female teams are assigned in a nondiscrimnatory manner?

(vi) Assignment and compensation of coaches and tutors.

OSPR Memorandum of September 28, 1979

Title VI
of the Civil Rights Act of 1964

Issue:

What are the appropriate standards of comparison to determine whether a school system has discriminated in its employment of teachers and administrators? Is a comparison of the percentage of minority teachers and administrators in the school system with the percentage of minority students in the school system an appropriate standard?

Facts:

Following a compliance review, investigators determined that when the recipient consolidated its dual system of education for the deaf and blind, the percentage of minority students at the consolidated school rose to 40% while the percentage of minority teachers and administrators was significantly lower.

Decision:

To determine whether a school system has discriminated in its employment practices, the appropriate standard is a comparison between the percentage of minorities employed by the school system in certain job categories with the percentage of minorities with requisite skills for such jobs in the labor market. The job categories to be compared are those that provide direct contact with beneficiaries or which involve making decisions that affect beneficiaries.

In cases where there has been a consolidation of a dual school system, a further standard for determining whether employment discrimination has occurred is a comparison of the percentages of minority staff in such positions before and after consolidation. A significant decrease in the percentage of minority staff during the desegregation period may constitute a violation of Title VI.

A comparison between the percentage of minority staff and the percentage of minority students is not an appropriate standard to determine whether the school district has discriminated in its employment practices.

What are the appropriate standards of comparison to determine whether a school system has discriminated in its employment of teachers and administrators? Is a comparison of the percentage of minority teachers and administrators in the school system with the percentage of minority students in the school system an appropriate standard?

Authority:

This decision involves the following section of the Title VI regulation:

Section 100.3 Discrimination prohibited.

(c) Employment practices.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

OSPR Memorandum of August 13, 1979

Title VI
of the Civil Rights Act of 1964

Issue:

Is a school district in violation of Title VI if, during the period of desegregation, it significantly decreases its proportion of minority teachers?

Facts:

Following a complaint investigation, OCR determined that from 1969 (the first year of desegregation) to 1978, minority faculty dropped from 75 or 50% minority to 73 or 32% minority, while the nonminority faculty rose from 75 or 50% nonminority to 155 or 68% nonminority. During this 10-year period, the recipient used only such informal recruitment techniques as "word of mouth" advertising of vacancies.

Decision:

Where (1) there is a significant decrease in the percentage of minority faculty during the period of desegregation, and (2) the recipient fails to utilize recruitment techniques that will assure equal opportunity to to prospective minority applicants, the recipient is in violation of Title VI.

Authority:

This decision involves the following section of the Title VI regulation:

Section 100.3 Discrimination prohibited.

(c) Employment practices.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, race, color, or national origin, to exlude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

OSPR Memorandum of August 14, 1979

Section 504
of the Rehabilitation Act of 1973

Issue:

Should the American National Standards Institute (ANSI) accessibility standards be used during a compliance review to determine whether a recipient's programs are accessible to physically handicapped persons?

Facts:

From information in a compliance review of a high school built before June 3, 1977, the effective date of the Section 504 regulation, OCR determined that the education program was accessible to handicapped students. The building itself did not conform to American National Standards Institute (ANSI) specifications.

Decisions:

Investigators should be aware of the distinction between program accessibility and facility accessibility when conducting compliance reviews. Specific physical accessibility standards, such as ANSI, apply only to buildings, equipment, and facilities constructed or purchased after June 2, 1977. A finding of noncompliance cannot be made if programs operated in buildings constructed prior to this date are accessible to handicapped persons. Therefore, the school district was in compliance with the requirements of Section 504.

Authority:

This decision involves the following sections of the Section 504 regulation:

Section 104.22 Existing facilities.

(a) Program accessibility. A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) Methods. A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health,

Should the American National Standards Institute (ANSI) accessibility standards be used during a compliance review to determine whether a recipient's programs are accessible to physically handicapped persons?

welfare, or other social services at alternate accessible sites, alteration of existing facilities in conformance with the requirements of §104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

Section 104.23 New construction.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) Alteration. Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) American National Standards Institute accessibility standards. Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)), which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

OSPR Memorandum of August 13, 1979

INDEX
POLICY DIGEST
VOL. I, Nos. 1, 2, 3
TITLE VI
OF THE CIVIL RIGHTS ACT OF 1964

Affirmative action officer

See EMPLOYMENT

Effective date

See EMPLOYMENT

EMPLOYMENT

V.I, No. 2, p. 20
V.I, No. 2, pp. 32-34
V.I, No. 3, pp. 14-15
V.I, No. 3, p. 16

Faculty changes during desegregation

See EMPLOYMENT

JURISDICTION

V.I, No. 1, pp. 50-51

MEDICAID

V.I, No. 2, pp. 21-22

Parochial school systems

See JURISDICTION

Standards for determining discrimination

See EMPLOYMENT

State accrediting committee

See JURISDICTION

TESTS, ADMISSIONS

V.I, No. 1, pp. 10-11

Vocational schools

See TESTS, ADMISSIONS

INDEX
POLICY DIGEST
VOL. I, Nos. 1, 2, 3
TITLE IX
OF THE EDUCATION AMENDMENTS OF 1972

Accommodation of interests, athletics

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

Assessment of interests, athletics

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

ATHLETIC ASSOCIATIONS

V.I, No. 2, pp. 14-16

Athletic facilities

See ATHLETIC OPPORTUNITY, FACILITIES

Athletic interests

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS
ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS
ATHLETIC OPPORTUNITY, SCHEDULING

ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

V.I, No. 1, p. 6
V.I, No. 1, p. 7
V.1, No. 3, pp. 6-7
V.1, No. 3, pp. 8-9
V.1, No. 3, pp. 10-11

See also ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS

ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS

V.I, No. 1, p. 5

See also ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

ATHLETIC OPPORTUNITY, COACHING

V.I, No. 2, pp. 12-13
V.I, No. 2, p. 17
V.I, No. 3, pp. 4-5
V.I, No. 3, pp. 12-13

ATHLETIC OPPORTUNITY, FACILITIES

V.I, No. 1, p. 9

ATHLETIC OPPORTUNITY, OFFICIALS

V.I, No. 2, pp. 5-7

ATHLETIC OPPORTUNITY, PUBLICATIONS

V.I, No. 2, pp. 18-19

ATHLETIC OPPORTUNITY, SCHEDULING

V.I, No. 2, p. 8

ATHLETIC OPPORTUNITY, UNIVERSITIES

V.I, No. 2, pp. 8-9

Athletics, intramural

See RECREATIONAL FACILITIES

Athletics, noncompetitive

See RECREATIONAL FACILITIES

Athletics, recreational

See RECREATIONAL FACILITIES

Coaching

See ATHLETIC OPPORTUNITY, COACHING

Compensation, coaches'

See ATHLETIC OPPORTUNITY, COACHING

Compensation, officials'

See ATHLETIC OPPORTUNITY, OFFICIALS

COUNSELING

V.I, No. 1, p. 1

See also COURSE OFFERINGS
PUBLICATIONS

COURSE OFFERINGS

V.I, No. 1, p. 4
V.I, No. 2, pp. 1-2
V.I, No. 2, pp. 10-11
V.I, No. 3, pp. 1-3

See also COUNSELING
PUBLICATIONS

Disproportionate enrollments

See COUNSELING
PUBLICATIONS

Extracurricular activities

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS
ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS
ATHLETIC OPPORTUNITY, SCHEDULING
ATHLETIC OPPORTUNITY, UNIVERSITIES
COURSE OFFERINGS
RECREATIONAL FACILITIES

Facilities, athletic

See ATHLETIC OPPORTUNITY, FACILITIES

JURISDICTION

V.I, No. 1, pp. 50-51

Music program

See COURSE OFFERINGS

Noncontact sports

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

Notification

See COURSE OFFERINGS

Officials, athletic

See ATHLETIC OPPORTUNITY, OFFICIALS

Physical education classess

See COURSE OFFERINGS

Pregnancy, students

See COURSE OFFERINGS

PUBLICATIONS

V.I, No. 2, pp. 3-4

RECREATIONAL FACILITIES

V.I, No. 1, p. 2

Remedy, failure to accommodate athletic interests

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

Scheduling, athletics

See ATHLETIC OPPORTUNITY, SCHEDULING

Separate teams

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

Special programs

See COURSE OFFERINGS

Sports offered

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS

Standards for determining accommodation

See ATHLETIC OPPORTUNITY, ACCOMMODATION OF INTERESTS
ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS

Survey, athletic interests

See ATHLETIC OPPORTUNITY, ASSESSMENT OF INTERESTS

Swimming pools

See RECREATIONAL FACILITIES

Testing

See COURSE OFFERINGS

Universities, athletics

See ATHLETIC OPPORTUNITY, UNIVERSITIES

Vocal music program

See COURSE OFFERINGS

Vocational courses

See COUNSELING
COURSE OFFERINGS
PUBLICATIONS

INDEX
POLICY DIGEST
VOL. I, Nos. 1, 2, 3
SECTION 504
OF THE REHABILITATION ACT OF 1973

ACCESSIBILITY, HOUSING

V.I, No. 1, p. 49

ACCESSIBILITY, PROGRAM

V.I, No. 2, pp. 28-29
V.I, No. 3, pp. 17-18

Adjunct program

See JURISDICTION

ADMISSION, PROFESSIONAL SCHOOL

V.I, No. 2, pp. 26-27

Adult education

See FINANCIAL REQUIREMENTS

AGE LIMIT, ATHLETES

V.I, No. 1, pp. 47-48

Alcoholism, history of

See INSURANCE

Alcoholism, treatment of

See INSURANCE

ANSI accessibility standards

See ACCESSIBILITY, PROGRAM

Assessment

See ADMISSION, PROFESSIONAL SCHOOL
EVALUATION
EXTENDED SCHOOL YEAR

Blind

See ADMISSION, PROFESSIONAL SCHOOL
GUIDE DOGS IN HOSPITALS

Bus driver, hearing impaired

See EMPLOYMENT

Citation of violation

See OBLIGATION TO PROVIDE EDUCATION

Conflicting medical opinions

See "QUALIFIED HANDICAPPED PERSON"

Convicts

See PRISON RECORDS

COURSE OFFERINGS

V.I, No. 1, pp. 43-44

Deaf

See AGE LIMIT, ATHLETES
EMPLOYMENT
JURISDICTION

Dog guides

See GUIDE DOGS IN HOSPITALS

Drug abuse

See INSURANCE
PRISON RECORDS

Due process

See PROCEDURAL SAFEGUARDS

Education

See ACCESSIBILITY, PROGRAM
ADMISSION, PROFESSIONAL SCHOOL
COURSE OFFERINGS
EVALUATION
EXTENDED SCHOOL YEAR
FINANCIAL OBLIGATION
INTEGRATION PRACTICES
JURISDICTION
OBLIGATION TO PROVIDE EDUCATION
PROCEDURAL SAFEGUARDS
TRANSPORTATION

EMPLOYMENT

V.I, No. 1, pp. 25-26
V.I, No. 2, pp. 23-25
V.I, No. 2, pp. 32-34

See also INSURANCE
PRISON RECORDS
"QUALIFIED HANDICAPPED PERSON"

EVALUATION

V.I, No. 1, p. 15

See also EXTENDED SCHOOL YEAR

EXTENDED SCHOOL YEAR

V.I, No. 1, pp. 28-31
V.I, No. 1, pp. 32-33

Extracurricular activities

See AGE LIMIT, ATHLETES
INTEGRATION PRACTICES
TRANSPORTATION

Facilities

See ACCESSIBILITY, PROGRAM

Felony

See PRISON RECORDS

FINANCIAL OBLIGATION

V.I, No. 1, pp. 39-40

See also OBLIGATION TO PROVIDE EDUCATION

GUIDE DOGS IN HOSPITALS

V.I, No. 1, p. 19

Hearing

See PROCEDURAL SAFEGUARDS

Hearing impaired

See AGE LIMIT, ATHLETES
EMPLOYMENT
JURISDICTION

Hospitals, guide dogs

See GUIDE DOGS IN HOSPITALS

Housing, accessibility

See ACCESSIBILITY, HOUSING

INSURANCE

V.I, No. 1, p. 23
V.I, No. 1, p. 24

INTEGRATION PRACTICES

V.I, No. 1, pp. 41-42

Interpreters

See JURISDICTION

I.Q. test

See EVALUATION

JURISDICTION

V.I, No. 1, p. 12
V.I, No. 1, p. 21

See also EMPLOYMENT

Location, change

See PROCEDURAL SAFEGUARDS

Mainstreaming

See INTEGRATION PRACTICES

Medical opinions

See "QUALIFIED HANDICAPPED PERSON"

Mobility impaired

See ACCESSIBILITY, HOUSING
ACCESSIBILITY, PROGRAM

Multiple citation

See OBLIGATION TO PROVIDE EDUCATION

OBLIGATION TO PROVIDE EDUCATION

V.I, No. 1, pp. 34-36
V.I, No. 1, pp. 37-38

See also FINANCIAL OBLIGATION

Off-campus housing

See ACCESSIBILITY, HOUSING

PREGNANCY

V.I, No. 1, p. 14

PRISON RECORDS

V.I, No. 1, p. 22

PROCEDURAL SAFEGUARDS

V.I, No. 1, pp. 56-57

"QUALIFIED HANDICAPPED PERSON"

V.I, No. 1, p. 17

See also EMPLOYMENT
PREGNANCY
PRISON RECORDS

Related services, appropriate education

See TRANSPORTATION

Residential center

See OBLIGATION TO PROVIDE EDUCATION

Safeguards

See PROCEDURAL SAFEGUARDS

School year

See EXTENDED SCHOOL YEAR

Segregated facilities

See COURSE OFFERINGS
INTEGRATION PRACTICES

Special purpose school

See COURSE OFFERINGS
INTEGRATION PRACTICES

Summer school

See EXTENDED SCHOOL YEAR

Testing

See ADMISSION, PROFESSIONAL SCHOOL
EVALUATION

TRANSPORTATION

V.I, No. 1, p. 27
V.I, No. 2, pp. 30-31

Vision impaired

See ADMISSION, PROFESSIONAL SCHOOL
GUIDE DOGS IN HOSPITALS

Vocational education courses

See COURSE OFFERINGS

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